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Supreme Court, U.S.
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In The
Supreme Court Of The United States

GREGORY KEREAKOGLOW,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF
MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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July 27, 2010

QUESTION PRESENTED

State law criminalizes possession of matter harmful to a minor with intent to disseminate it to a minor. Whether particular matter is harmful to a minor is judged by county standards, either as proved by external evidence such as expert testimony, or as determined by the fact finder from its own knowledge of the [county's mores] [or normative views of the county's adults] The county standard is an essential element of the crime.

The question presented is:

Whether, where the crime charged was committed in Hampshire County but tried to an Essex County jury, and no evidence regarding Hampshire County standards was presented, the First Amendment and the due process clause of the Fourteenth Amendment require judicial entry of a judgment of acquittal?

LIST OF PARTIES

The petitioner is Gregory Kereakoglow, the defendant in this state criminal prosecution.

The respondent is the Commonwealth of Massachusetts, the prosecuting authority in this state criminal prosecution.

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OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court, the highest state court to review the merits of Petitioner's claims appears at Appendix A to the petition and is reported as Commonwealth v. Kereakoglow, 456 Mass. 225, 922 N.E. 2d 790 (2010).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Supreme Judicial Court decided Kereakoglow's case on March 10, 2010. A timely petition for rehearing was thereafter denied on April 28, 2010. A copy of the order denying the petition for rehearing is reproduced in Appendix B.

This petition has been filed within 90 days after the petition for rehearing was denied.

The Court has jurisdiction of this case pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The due process clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Massachusetts General Law ch. 272, §28 provides in relevant part:

> Whoever disseminates to a minor any matter harmful to minors, as defined in section thirty-one, knowing it to be harmful to minors, or has in his possession any such matter with the intent to disseminate the same to minors, shall be punished....

Massachusetts General Law ch. 272, §31 provides in relevant part:

> Matter is harmful to minors if . . ., taken as a whole, it (1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors; (2) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors.

STATEMENT OF THE CASE

This case presents an important, recurring question regarding the administration of the requirements of Jackson v. Virginia in prosecutions involving materials which may be protected by the First Amendment, where the sufficiency of the evidence to establish the relevant community standards is contested. Prosecutorial reliance on the jurors' knowledge of local mores creates a difficult constitutional dilemma where none of the jurors is a resident of the relevant community. Massachusetts appellate courts have held that the contested material itself satisfies Jackson. This doctrine conflicts with Jackson and eliminates a constitutionally required First Amendment safeguard from the sufficiency of the evidence analysis.

On August 20, 2006 Gregory Kereakoglow, a 50 year-old resident of South Hadley in Hampshire County, Massachusetts, sat down at his home computer and logged onto the internet for the purpose of seeking sexual gratification through imaginary internet interaction. He went to an adult nudist site – a "chat room" – looking for fantasy interaction. There he engaged in "instant messaging" with another adult who was acting out a different imaginary scenario: Wenham, Massachusetts police officer Jonathan Gray. Officer Gray had signed online pretending to be a 15 year-old girl, "Jenny G.," and was using the email name of "jenny15.chrldr." Tr1:129-133 [A.24-28]; 209-220 [A.33-44]; Tr. Ex. 2, A.45-46.

Mr. Kereakoglow did not know who nor how old his correspondent was, nor was this his concern. He was looking for someone who would participate in a sexual fantasy with him. Stip:11,12,44,49-50,73. Jenny G.'s message promised:

> "I can be what eva you want me to be !!!!!!! (I'm a highschool student)" and invited: "If Im not here dude, come and check me on myspace. Just follow the following link. If im there we'll definitelyhook!
> http://www.myspace.com/jenny15chldr."

A.45. In the course of his ensuing on-line "chat," with Officer Gray, Kereakoglow emailed to Officer Gray three images of himself nude, Tr1:146, 163-166, [A.29, 30-32], with his genitals prominently displayed. A:70-72 [photographic copies of the images, Trial Exhibits 3a-3c].

A week later Kereakoglow was arrested and made an explanatory statement to police.

Kereakoglow was put to jury trial in Ipswich District Court in Essex County, Massachusetts, on October 22, 2008 on a complaint charging him with [1] possession of matter harmful to a minor with intent to disseminate such matter to a minor [M.G.L. c. 272, §28] and [2] enticement of a minor [M.G.L. c. 265, §26C].

The possession with intent to disseminate complaint, which tracked the statutory language, permitted conviction under either of two theories: [1] that the matter is obscene, and [2] that the matter is "patently contrary to prevailing standards of adults in the county where the offense was committed as to

suitable material for such minors." M.G.L. c. 272, §28.

Kereakoglow made a general motion for a required finding of not guilty on the possession with intent charge at the close of the prosecution's evidence but did not argue that the evidence of the Hampshire County standards was constitutionally insufficient.[1] Tr2:91.[2] The district court ruled that the evidence of obscenity was insufficient and submitted the case to the jury only on the "appeals to the prurient interests of minors" ground of criminal liability. Id.

Kereakoglow was acquitted on the enticement charge and convicted of the possession with intent to disseminate charge. Tr3:6. He was sentenced to 30 months imprisonment in a house of correction. Tr3:27, 31.

Kereakoglow filed a timely notice of appeal. The Supreme Judicial Court granted his petition for direct appellate review. Commonwealth v. Kereakoglow, 456 Mass 225, 922 N.E.2d 790 (2010).

It was on appeal that Kereakoglow first articulated his claim that the complete absence of evidence of Hampshire County standards required an acquittal on the possession with intent to disseminate charge. In his petition for direct

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[1] This is the procedure prescribed in Rule 25 of the Massachusetts Rules of Criminal Procedure.

[2] The trial was on October 22, 23, and 24, 2008. The trial transcripts are cited as "Tr1:page" for October 22; "Tr2:page" for October 23; and "Tr3:page" for October 24.

appellate review by the Supreme Judicial Court[3], Kereakoglow asserted that the community standards element embodied a crucial First Amendment protection against convictions based on protected material; and that the rule of Jackson v. Virginia, 443 U.S. 307, 61 L.Ed2d 560, 99 S.Ct. 2781 (1979) required entry of a judgment of acquittal on the possession with intent to disseminate charge because no evidence of the relevant community standard had been presented and the Essex County jury lacked the personal knowledge required to discern that standard itself. The relevant excerpt of this petition is reproduced in Appendix C.

Kereakoglow reasserted this claim in his opening brief at pages 9 through 29, in his reply brief at pages 3 through 6, and in his petition for rehearing at pages 1 through 5. The Commonwealth argued that the error was invited. Brief for the Commonwealth, 17-18. The Supreme Judicial Court rejected the Commonwealth's argument and decided this issue on its merits. Kereakoglow, 456 Mass at 228.

The Supreme Judicial Court reversed the Kereakoglow's conviction, finding that errors in the

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[3] Under Massachusetts law, Kereakoglow's direct appeal was to the Massachusetts Appeals Court, an intermediate appellate court, with a subsequent opportunity to request further appellate review in the Supreme Judicial Court, the state's highest appellate court. By statute and rule, an appellant may petition the Supreme Judicial Court for direct appellate review, in which the Appeals Court is bypassed and the appeal is considered in the first instance by the Supreme Judicial Court. See, M.G.L. c. 211A, §§ 10, 11; Rules 11 and 27 of the Massachusetts Rules of Appellate Procedure.

instructions created a substantial risk of a miscarriage of justice. Id., 456 Mass at 228. The Court held that Kereakoglow could be retried on this charge because the matter at issue would support a conviction under the standards of any Massachusetts county:

> "[w]e agree with the Commonwealth that the evidence was sufficient to support a jury determination that the images were 'patently contrary' to the prevailing standards of adults in any county, including Hampshire County, for material suitable to minors (and therefore the case may be retried)...."

Id., 456 Mass at 228.

Kereakoglow filed a motion for reconsideration, again arguing that the due process clause of the Fourteenth Amendment required acquittal because no evidence of the Hampshire County standard – an essential element of the crime charged – had been presented.

In this fashion the Supreme Judicial Court reversed Kereakoglow's conviction on the ground that his jury had not been instructed to apply Hampshire County standards. The state court acknowledged that no evidence of the Hampshire County standards had been presented, and that the jurors were all Essex County residents. It rejected Kereakoglow's claims that he had been deprived of the benefit of the statutorily-specified community standard -- a crucial First Amendment safeguard against convictions based on protected material -- and of a fundamental principle of due process: the right to be acquitted where the evidence is

insufficient as a matter of law to support a finding that each essential element of the crime charged had been proved beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

I. THE MASSACHUSETTS SUPREME JUDICIAL COURT HAS DECIDED AN IMPORTANT ISSUE OF CONSTITUTIONAL CRIMINAL PROCEDURE IN A MANNER WHICH CONFLICTS DIRECTLY WITH THIS COURT'S HOLDINGS IN JACKSON V. VIRGINIA, MILLER V. CALIFORNIA, AND HAMLING V. UNITED STATES.

A. This Case Presents The Conflict Directly.

The Massachusetts Supreme Judicial Court's decision conflicts directly with this Court's holding in Jackson v. Virginia, supra, and is incompatible with the Court's holdings in Miller v. California, 413 U.S. 15, 23-24, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973). and Hamling v. United States, 418 U.S. 87, 104, 41 L.Ed2d 590, 94 S.Ct. 2887 (1974). A brief review of this Court's holdings which control the issue presented in this case demonstrates the fundamental nature of the problem.

1. Due Process Requires Both That Criminal Charges Be Decided Solely On Evidence And That Trial Judges Intervene Where The Evidence Is Insufficient.

This case presents the question of how the "community standards" factor in the definition of "matter harmful to a minor," -- which safeguards against criminal convictions based on materials protected by the First Amendment -- interacts with the due process principles of Jackson v. Virginia, supra. In this state prosecution for possessing matter harmful to minors with intent to distribute it to a minor, the prosecution did not present any evidence pertaining to the relevant community standard – the county in which the crime was committed. No juror was a resident of that county. Petitioner asserted that the complete absence of any evidence of the relevant community standard required entry of a judgment of acquittal in his favor. The state court held that the evidence was constitutionally sufficient because a jury could have found that the contested matter was harmful to minors under any county's standard. Kereakoglow, 456 Mass at 228.

The state appellate court did not address the fact that no evidence of the relevant county standard had been presented.

Due process requires that a conviction be based on evidence presented to the fact finder. Jackson, 443 U.S. at 314-316; Vachon v. New Hampshire, 414 U.S. 478, 38 L.Ed2d 666, 94 S.Ct. 664 (1974). Due process requires that, before

submitting a case to a jury, the trial judge must evaluate the record evidence to insure that it is constitutionally sufficient to support a conviction. Jackson, 443 U.S. at 317-319. In a state prosecution, the judge's sufficiency assessment must be made in reference to the essential elements of the crime charged as defined by state law. Id., at 324 n. 16. The Jackson safeguard is constitutionally necessary because "a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." Id.

Massachusetts law criminalizes the possession of matter harmful to a minor with intent to distribute that matter to a minor. M.G.L. c. 272, §§28, 31. Massachusetts law defines the relevant community as the county in which the crime charged was allegedly committed. M.G.L. c. 272, §31. Whether these county standards have been violated in a particular case presents a question of fact to be decided by a jury, Miller 413 U.S. at 24, 30, but only when the prosecution's evidence permits a rational fact finder to find the county standard beyond a reasonable doubt. Jackson, 443 U.S. at 317-319.

In Petitioner's case, the crime was allegedly committed in Hampshire County but the charge was tried in Essex County to a jury composed exclusively of Essex County residents. Because no extrinsic evidence of the Hampshire County community standard was presented, there was no evidence or other constitutionally acceptable basis which could support a jury finding beyond a reasonable doubt that the relevant community standard was violated.

The state court's ruling that the sufficiency of the evidence can be assessed without reference to the community standard specified in the definition of the crime charged deprives a defendant of the First Amendment community standard protection at that crucial juncture. It forces the trial judge to apply a lower standard of sufficiency than is required by Jackson. Where the jurors are not members of the relevant community, and the prosecution relies solely on the jurors' knowledge of local mores to establish the county standard, the Massachusetts rule requires the trial judge to ignore the fact that the jury will not be able to determine what the county standard is.

This rule deprives the defendant of the First Amendment protection embodied in the state designation of the relevant community standard. It also creates the distinct possibility that "a properly instructed jury may . . . convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. Jackson, 443 U.S. at 317. "[W]hen such a conviction occurs in a state trial, it cannot constitutionally stand." Id., at 318.

2. The First Amendment Requires The Use Of Community Standards To Avoid Convitions Based On Protected Materials.

The First Amendment requires that state statutes that criminalize obscene materials be carefully limited to matter which depicts or describes sexual conduct. Miller v. California, 413 at 23-24. Only those works which "taken as a whole, appeal to the prurient interest in sex, which portray sexual

conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value can be regulated. Id. These normative judgments are "essentially questions of fact," Miller, 413 U.S. at 30, and must be made by a fact finder who is guided by contemporary community standards. Id., at 24, 30, 31-32 [the fact finder must "determine whether certain materials are obscene as a matter of fact"].

Community standards may be the subject of proof by extrinsic evidence or the jurors may draw on their own knowledge of the views of the average person in the community. Hamling v. United States, 418 U.S. 87, 104, 41 L.Ed2d 590, 94 S.Ct. 2887 (1974). States are free to define the relevant community with or without reference to geographic boundaries. Jenkins v. Georgia, 418 U.S. 153, 157, 41 L.Ed2d 642, 94 S.Ct. 2750 (1974).

In Massachusetts the legislature has defined the relevant community as the county in which the crime was committed. M.G.L. c. 272, §31. Proof of a violation of this county community standard is an essential element of the crime charged. Commonwealth v. Trainor, 374 Mass. 796, 799-800, 374 N.E.2d 1216 (1978); Commonwealth v. Militello, 66 Mass. App. Ct. 325, 332, 848 N.E.2d 406 (2006).

In Petitioner's case, the prosecutor elected not to present extrinsic evidence of the relevant county standard. She chose to leave it to the jurors to deduce that standard from their own personal knowledge of the local mores. But since the jurors were not residents of the county in which the crime was allegedly committed, they had no knowledge of

the Hampshire County mores that they had to rely on to formulate. Without that guidance they could not perform their function of protecting First Amendment rights. In these circumstances, extrinsic proof of the Hampshire County standards was constitutionally required.[4] Because there was no evidence from which the jurors could find beyond a reasonable doubt that the Hampshire County standard had been violated, Petitioner was entitled to a judgment of acquittal at the close of the prosecution's case.

B. This Is A Recurring Problem Affecting An Issue Which Is Fundamental To The Protection Of First Amendment And Due Process Rights In Massachusetts

The Massachusetts appellate courts have twice addressed this problem in the past eight years. Their solution to this dilemma has been to dispense with proof of the specific county standard altogether in assessing the sufficiency of the evidence, where the fact finder is not a county resident. Kereakoglow, 456 Mass at 228; Commonwealth v. Sullivan, 55 Mass. App. Ct. 775, 780-781, 774 N.E.2d 679 (2002). In Kereakoglow, the Supreme Judicial Court declared that the images that were alleged to be

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[4] Without the benefit of this evidence, the jurors were free to speculate on what the county standard might be, or to formulate a standard from their personal views of the matter, as the prosecutor urged them to do in this case. Kereakoglow, 456 Mass at 227.

matter harmful to minors in that case would support a jury determination ***in any county*** that they were "patently contrary" to that county's mores. The Supreme Judicial Court invoked Sullivan, in which the Appeals Court expressed the reasoning underlying both decisions. The court held that the evidence was sufficient to justify giving the case to the jury even though none of the jurors was a resident of the county whose mores set the standard and no evidence of that county's standards had been presented. Kereakoglow, 456 Mass at 228.

The fact finder in Sullivan was a judge who was not a resident of Hampshire County, the county in which the crime was committed. No evidence of Hampshire County standards was presented. 55 Mass App Ct at 780. The Appeals Court reasoned that no evidence of the statutorily-specified community standard was required to establish the sufficiency of the evidence:

> "There is, to be sure, some force to the defendant's argument, for standards governing sexual material appropriate for display to minors no doubt vary somewhat from county to county throughout the Commonwealth. Indeed, that is the premise for the state's focus on county standards. Beneath county variations, though, lies a baseline, perhaps defined by the standards prevailing in the county with the most permissive views on the subject. Wherever the precise location of that baseline, our own review of the magazines and their nearly exclusive

> focus on photographs of body parts engaged, or about to engage, in sexual congress leads us to conclude that no reasonable and interested observer anywhere in the Commonwealth would think them suitable for display to children. Accordingly, we conclude that they could not possibly meet the standards of any of the Commonwealth's counties and thus that they necessarily fell below those prevailing in Hampshire County at the time the defendant's displays occurred."

Sullivan, 55 Mass App Ct at 781. In both Sullivan and Kereakoglow, the materials alone were deemed sufficient to warrant submitting the case to the fact finder even though the fact finder had no evidentiary or experiential basis for applying the community standard which was a constituent of one of the essential elements of the crime charged.

Consequently, in Massachusetts prosecutions involving materials which are allegedly obscene or constitute matter harmful to minors, the community standards designated by the legislature to guide the jury in deciding whether the matter violates local mores now play no part in determining the constitutional sufficiency of the evidence. That standard has been supplanted, for sufficiency of the evidence purposes, by a "baseline" standard which is not the standard by which the fact finder would judge the guilt or innocence of the defendant. The sufficiency of the evidence is determined according to a different, lower, standard than the jury is required

by law to apply in deciding whether the defendant is guilty. Compare, Jackson, 443 U.S. at 324 n. 16.

The judgment that the material at issue would be criminal under any county standard begs the sufficiency question. It ignores the fact that, without extrinsic evidence of the Hampshire County standard, the prosecution failed to present any evidence regarding the relevant community standard. Under the Miller-Hamling doctrine, no rational fact finder could find that the evidence established that the contested materials violated the county standards beyond a reasonable doubt. Jurors instructed to apply the county standard on that state of the evidence have no alternative to devising their own *ad hoc* standard, in all likelihood based on their individual values.

This rule permits Massachusetts fact finders to convict defendants for acts involving materials which are protected by the First Amendment. It deprives the defendants of their due process right to judicial protection from the risk of conviction by "a properly instructed jury [that] may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. Jackson, 443 U.S. at 317. "[W]hen such a conviction occurs in a state trial, it cannot constitutionally stand." Id., at 318.

CONCLUSION

Because these Massachusetts appellate decisions are fundamentally incompatible with this Court's holdings in Miller, Hamling and Jackson, this Court should grant the writ and reverse the Supreme Judicial Court's holding that the evidence in Kereakoglow's case was constitutionally sufficient to support his conviction.

Respectfully submitted,
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APPENDIX A

LEXSEE 456 MASS 225

COMMONWEALTH vs.
GREGORY KEREAKOGLOW.

SJC-10524

SUPREME JUDICIAL COURT
OF MASSACHUSETTS

456 Mass. 225, 922 N.E.2d 790,
2010 Mass. LEXIS 48

November 2, 2009, Argued
March 10, 2010, Decided

PRIOR HISTORY: [***1]

Essex. Complaint received and sworn to in the Ipswich Division of the District Court Department on October 12, 2006. The case was tried before Peter F. Doyle, J. The Supreme Judicial Court granted an application for direct appellate review.

HEADNOTES

Obscenity, Dissemination of matter harmful to minor, Community standard.

COUNSEL: John M. Thompson for the defendant.

Kenneth E. Steinfield, Assistant District Attorney, for the Commonwealth.

JUDGES: Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

OPINION BY: CORDY

OPINION

[*225] [**791] CORDY, J. The defendant, Gregory Kereakoglow, was convicted by a District Court jury of possession with intent to disseminate matter harmful to minors, in violation [**792] of *G. L. c. 272, § 28.* [1] He appealed to the Appeals Court and we granted his application for direct appellate review. The harmful matter consisted of three digital images of the fifty year old defendant, posing naked, which he sent by electronic mail to a police officer posing online as a fifteen year old girl living in Wenham (in Essex [*226] County). The Commonwealth agrees that the defendant resides in South Hadley (in Hampshire County), where the images were stored on his computer, and concedes, on appeal, that the offense of which the defendant was convicted was committed there. The trial, however, took [***2] place in Essex County, not

[1] Kereakoglow was also charged with child enticement, in violation of *G. L. c. 265, § 26C.* He was acquitted of that charge by the jury.

Hampshire County, [2] a matter of significance as discussed below.

The principal issue at trial was whether the naked images of the defendant constituted matter "harmful to minors." [3] *General Laws c. 272, § 31*, provides that matter is harmful [***3] to minors if it is either "obscene" or "if taken as a whole, it (1) describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors; (2) is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and (3) lacks serious literary, artistic, political or scientific value for minors."

During the trial, the judge ruled that the images were not "obscene" as a matter of law; consequently, the case was submitted to the jury on the Commonwealth's theory that the images were harmful matter under the alternate definition. In

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[2] Each of these crimes would have occurred in Essex County. With respect to the latter charge, the Commonwealth opted to proceed only on so much of the complaint as charged possession of matter harmful to minors with the intent to distribute it, a crime occurring, if at all, in Hampshire County. The defendant does not contend that the case against him was improperly brought in Essex County, and has, in any event, waived such a claim. See *Commonwealth v. Robinson, 48 Mass. App. Ct. 329, 336, 720 N.E.2d 480 (1999)*, citing *Opinion of the Justices, 372 Mass. 883, 896-897, 363 N.E.2d 652 (1977)* (venue may be waived).

[3] The defendant admitted to the police that he had sent the three images to the person he thought was fifteen years old, and that he knew that it was "inappropriate" to do so. A tape recording of his interview with police was played for the jury.

order to make that determination, the jury were required to decide whether the images were "patently contrary to prevailing standards of adults *in the county where the offense was committed* as to suitable material for such minors" (emphasis added). *G. L. c. 272, § 31.*

There was no testimony [***4] offered at the trial as to what the prevailing standards of adults in Hampshire County might be, [*227] and the jurors were drawn from Essex County.[4] In addition, in their closing arguments, both the prosecutor and defense [**793] counsel argued that the jury should apply the prevailing standards of adults in Essex County. Defense counsel essentially argued that the Commonwealth had not established what the prevailing standards in Essex County were and therefore the jury should acquit. The prosecutor told the jury that they were members of the Essex county community and therefore should apply their own standards to determine whether the images were harmful.

The judge instructed [***5] the jury

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[4] The Commonwealth was not required to offer expert testimony on what the prevailing standards in Hampshire County might be. See *Commonwealth v. Trainor, 374 Mass. 796, 799-800, 374 N.E.2d 1216 (1978).* Indeed, the "trier of fact may draw on his own knowledge of normative views in his own community in applying statutorily prescribed community standards." *District Attorney for the N. Dist. v. Three Way Theatres Corp., 371 Mass. 391, 394, 357 N.E.2d 747 (1976).* Here, however, the jury were drawn not from the Hampshire County "community," but from Essex County.

> "So that is the way in this case the Commonwealth has to prove that the matter is harmful to minors. That is -- if it is taken as a whole, it describes or represents nudity, sexual conduct or sexual excitement. . . . It describes or represents nudity so as to appeal predominantly to the prurient interest of minors and two -- is patently contrary to prevailing standards of adults *in the county where the offense was committed* as to suitable material for such minors. And three -- it lacks serious artistic, political or scientific value for mi minors. The Commonwealth must offer proof sufficient to sustain its burden on all three standards, not just one or two. That means each of those three things I described would be followed by an 'and.' They have to prove one and two and three." (Emphasis added.)

There was no mention of either Hampshire or Essex County in the judge's instruction or any instruction on how the jury were to determine the "county where the offense was committed." *G. L. c. 272, § 31.*

In these circumstances, it is apparent that the jury had no alternative but to decide whether the images were "patently contrary" to the prevailing standards of adults in Essex County, [***6] and the Commonwealth does not contend otherwise. This was error.

[*228] The Commonwealth argues, however, that the error did not give rise to a substantial risk of

a miscarriage of justice because the images fell below a "baseline" standard of materials suitable for minors, applicable in all counties. See *Commonwealth v. Sullivan, 55 Mass. App. Ct. 775, 781, 774 N.E.2d 679 (2002)* ("no reasonable and disinterested observer anywhere in the Commonwealth would think [that explicit photographs of men and women engaging in assorted forms of sexual intercourse were] suitable for display to children"). [5] The defendant contends that his conviction should be reversed and the complaint dismissed because the Commonwealth failed to present any evidence of the prevailing standards in Hampshire County.

While we agree with the Commonwealth that the evidence was sufficient to support a jury determination that the images were "patently contrary" to the prevailing standards of adults in any county, including Hampshire County, for material suitable for minors (and therefore the case may be

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[5] The Commonwealth also contends that any error here was "invited" by the defendant. While it was plainly error for the case to have been prosecuted and defended on the theory that the material at issue was to be judged on the prevailing standards of adults in Essex County rather than Hampshire County, it can hardly be said that the defendant "invited" the error rather than joined in it. Contrast *Commonwealth v. Knight, 37 Mass. App. Ct. 92, 99-100, 637 N.E.2d 240 (1994)* [***7] (where judge gave erroneous manslaughter instructions requested by defendant, "defendant on appeal bears a heavy burden in attempting to have his conviction overturned" based on error in instruction). In any event, the standard we apply is a substantial risk of a miscarriage of justice. *Id. at 100.*

retried),[6] a properly instructed jury, applying [**794] the prevailing standards of adults in Hampshire County, may have concluded otherwise. Consequently, we are not persuaded that the error did not create a substantial risk of a miscarriage of justice. The conviction therefore must be reversed.

In light of this conclusion, we need not address claims made by the defendant regarding other alleged errors at trial. However, because it may arise again at retrial, it is appropriate for us to address the defendant's contention that he was [***8] entitled to an instruction that, in determining whether the matter is "patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for . . . minors," [*229] the jurors must acquit if they cannot determine the views of the "average citizen" of the county "as a whole."

In support of the argument that he was entitled to this instruction, the defendant points out that such an instruction has been required in obscenity cases. See *Commonwealth v. Trainor, 374 Mass. 796, 800, 374 N.E.2d 1216 (1978).* We decline to require that the instruction be given in cases not requiring proof of the elements of obscenity as set forth in *G. L. c. 272, § 31.* [7], [8]

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[6] The photographs, while not obscene, prominently displayed the defendant's genitals.

[7] Matter is "[o]bscene" if, "taken as a whole," it satisfies all three prongs of the following test: the matter must "(1) appeal[ ] to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed; (2) depict[ ] or describe[ ] sexual conduct in a

With respect to matters "harmful to minors" -- the only issue here -- the question for the jury is whether the matter is "patently contrary to prevailing standards of adults in the county where the offense was committed." *G. L. c. 272, § 31.* While this requires the jury to consider the prevailing standards of the adults of the county, rather than their own normative views, unanimity is necessary only on whether the suitability of the materials (for minors) is "patently contrary" to such standards. Although the jurors may disagree as to precisely what those standards are, that is not a bar to their determining that the material in question is, in any event, "patently contrary" to any of their formulations.

The [***10] defendant's conviction is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

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patently offensive way; and (3) lack[ ] serious literary, artistic, political or scientific value." *G. L. c. 272, § 31.*

[8] Matter that meets the statutory definition of obscene is also a category of matter "harmful [***9] to minors" barred by *G. L. c. 272, § 28.* As noted above, the Commonwealth does not contend that the nude images here were obscene, and the judge concluded that they were not. Consequently, the jury were not required to consider whether they met the definition of obscenity, a definition that applies to materials distributed both to adults and minors.

APPENDIX B

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
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Telephone 617-557-1020, Fax 617-557-1145

John M. Thompson, Esquire
Thompson & Thompson, P.C.
1331 Main Street, Suite 320
Springfield, MA 01103

RE: No. SJC-10524
COMMONWEALTH
vs.
GREGORY KEREAKOGLOW
NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Susan Mellen, Clerk

Dated: April 28, 2010

To: Kenneth E. Steinfield, A.D.A.
John M. Thompson, Esquire
Ipswich District Court

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

APPEALS COURT NO. 2009-P-0087

COMMONWEALTH

vs.

GREGORY KEREAKOGLOW,
Defendant-Appellant

ON APPEAL FROM A JUDGMENT
OF THE IPSWICH DISTRICT COURT

DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

John M. Thompson
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July 7, 2009

[****]

A. The Evidence Was Constitutionally Insufficient To Support A Conviction On The Possession With Intent To Disseminate Charge Because The Essex County Jury Was Provided No Evidentiary Basis From Which It Could Determine What The Hampshire County Standards Of Tolerance For The Materials In Question Were.

The parties have submitted extensive memoranda of law in support of and in opposition to Mr. Kereakoglow's renewed motion for a stay of execution of his sentence. The positions taken by each in these memos forms the basis for this synopsis of the arguments presented in this appeal.[6]

The Commonwealth has conceded that the crime of possession of materials harmful to minors, if it was committed, occurred in Hampshire County. Stay Opposition, pages 2, 8. Accordingly, it was incumbent on the Commonwealth to present evidence from which the jury could determine, beyond a reasonable doubt, what the Hampshire County standards of tolerance were for the images in question. Indisputably, no such evidence was presented.

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[6]Appellant's Memorandum Of Law In Support Of Motion For Stay Of Execution Of Sentence Pending Appeal, is referred to as "Memorandum, page"; Commonwealth's Opposition To Defendant's Renewed Motion For Stay Of Sentence Pending Appeal, is referred to as "Opposition, page."

The Commonwealth argues that the images themselves constitute sufficient evidence that the images were harmful to minors regardless of the county standard applied. Stay Opposition, 9-11. The sole legal authority cited for this argument is Commonwealth v. Sullivan, 55 Mass App Ct 775, *rev. denied.*, 438 Mass 1102 (2002). In Sullivan, the Appeals Court held that, in a bench trial in which the judge was not a resident of the county in which the crime occurred, the absence of any evidence of that county's standards of tolerance did not require acquittal because the appellate judges' own review of the photographs in question [which pictured close-ups of male and female genitals engaging or about to engage in sexual intercourse] "leads us to conclude that no reasonable and disinterested observer anywhere in the Commonwealth would think them suitable for display to children." 55 Mass App Ct at 781.

Appellant Kereakoglow asserts that the Sullivan ruling conflicts with established SJC and Appeals Court precedents and is constitutionally untenable. Sullivan conflicts with the Supreme Judicial Court's holding in Commonwealth v. Trainor, 374 Mass 796, 799-800 (1978) and the Appeals Court's holding in Commonwealth v. Dane Enterprises, 23 Mass App Ct 1017 (1987). Trainor held that, when the Commonwealth elects to rely on the knowledge of the jurors to establish county standards, it runs the risk that the trier of fact will be unable to determine what that standard is. 374 Mass at 800. If that occurs, the consequence is acquittal. 23 Mass App Ct at 1018. Under Jackson v. Virginia, 443 U.S. 307, 317-319 (1979), and Commonwealth v. Latimore, 378 Mass 676, 678 (1979), that issue may go to the jury only when the

fact finder has the requisite personal knowledge to identify the county standard beyond a reasonable doubt. Where, as here, the jurors are not residents of the county in which the crime occurred, federal and state due process principles require that acquittal be directed by the trial judge. Id; Trainor, supra; Dane Enterprises, supra.

The legislature has made the standards of the residents of the county in which the crime was committed an essential element of the crime charged here. Federal and state due process principles require proof of this element beyond a reasonable doubt. Commonwealth v. Latimore, supra; Jackson v. Virginia, supra. Federal due process requires this element as a First Amendment safeguard to insure that jurors use an objective standard rather than a subjective standard in determining prurience issues. Miller v. California, 413 U.S. 15, 23-24 (1973).

The effect of the Sullivan ruling is to abrogate the county standard and to thwart the Jackson and Latimore constitutional safeguards against conviction on less than proof of guilt beyond a reasonable doubt. As applied in Kereakoglow's trial, the Sullivan rule required the jury to speculate on this indispensable element of the crime. It rendered the statute unconstitutionally vague as applied to Mr. Kereakoglow's conduct. Commonwealth v. Quinn, 439 Mass 492, 500-501 (2003).

The Commonwealth's argument requires clarification of whether, and if so under what circumstances the prosecution can rely solely on the fact finder's evaluation of the materials to establish that they are obscene or excessively prurient, so that possession of them with intent to disseminate to minors can be punished without violating the First

Amendment. Kereakoglow asserts that the county standard must be established in any event, either through the fact finder's personal knowledge or through extrinsic evidence. District Attorney for the Northern District v. Three Way Theatres Corp., 371 Mass 391, 394 (1976); Miller v. California, supra; Hamling v. United States, 418 U.S. 87, 104-105 (1974).

Each of these issues is an important and unresolved question of general application in this intersection of First Amendment, due process and child protection laws. The Sullivan rule impermissibly licensed the jury in this case to convict Mr. Kereakoglow on either speculation or personal standards of tolerance in violation of his right to due process and freedom of speech.